

Digitizing Employment and Employment Status in the Era of Gig Work: The Case of Uber and Uber Drivers

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1.0 BACKGROUND

Uber Technologies Inc. is a ride-hailing company that developed what has been widely described as a disruptive technology¹⁰⁸, in Kenya and globally. It is an online platform that allows the user to order the nearest vehicle to their location as pinpointed by the Global Positioning Satellite (GPS).¹⁰⁹ The company was founded in 2009 by Travis Kalanick and Garrett Camp, and quickly became a captain in the transport industry.

Uber reported revenues of \$31.8 billion, despite overhead costs resulting in a loss of \$9.06 billion for the year ended December 31, 2022.¹¹⁰ For the end of the 2023 first Quarter, Uber reported a 29% Year-on-Year rise in revenue to \$8.8 billion, showing positive and strong growth as compared to the first quarter of 2022.¹¹¹ Europe, Middle East and Africa contributed a total of \$2.09 billion to that figure, representing an increase of 86% from Q1 2022.¹¹² This was the highest single point of growth as compared to other regions around the globe, indicating rapid uptake of the application and favorable business conditions in the said region.

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¹⁰⁸ Cramer J and Krueger A, “Disruptive Change in the Taxi Business: The Case of Uber” (2016) 1065 177

¹⁰⁹ Slavulj M, Kanižaj K and Đurđević S, “The Evolution of Urban Transport – Uber” in Stjepan Lakušić (ed), *Road and Rail Infrastructure IV* (University of Zagreb 2016).

¹¹⁰ Uber Technologies Inc. ‘Form 10-K’. (2023). <https://s23.q4cdn.com/407969754/files/doc_financials/2023/ar/2022-annual-report.pdf> accessed 6 May 2023.

¹¹¹ Uber Technologies Inc. ‘Uber Announces Results for First Quarter 2023’ <https://s23.q4cdn.com/407969754/files/doc_financials/2023/q1/Uber-Q1-23-Earnings-Press-Release.pdf> accessed 6 May 2023.

¹¹² n4, 3.

Despite various scandals that have made the company an interesting one to watch by the business community, Uber has acquired its global position on merit. In addition to providing an accessible, affordable and easy-to-use innovation, it has provided gainful employment to about 22,800 employees worldwide and facilitated over 5 million drivers and couriers to earn a living globally.¹¹³ Uber employs approximately 12000 drivers in Kenya alone. The company is regulated by the National Transport and Regulatory Authority under the Transport Network Companies, Owners, Drivers and Passengers Regulations of 2022.

1.1. THE PROBLEM FACING UBER WORKERS UNDER KENYAN LABOUR LAW REGIME

Uber (hereafter ‘the company’) was launched in Kenya in early 2015 with the promise of providing efficient transportation solutions and changing the lives of drivers in the country.¹¹⁴ However, it was not long before the company was embroiled in bitter disputes over remuneration with its drivers. In 2016, thirty-three (33) aggrieved Uber drivers brought action against the company because of a 35% slash in fares despite the 25% commission remaining constant.¹¹⁵ The move was unfair given that the drivers would be required to remit a larger portion of their earnings to the company. The slash in fares represents a faulty business model that works via driver exploitation.

According to Horan, Uber has directed its efforts towards bookings growth, meaning that it prefers to rake in the highest numbers in terms of usage.¹¹⁶ The ‘growth at all costs strategy’ at Uber is to saturate the market by attracting drivers to increase the supply of transportation units and subsidize fares using funding to amass market share.¹¹⁷ Under the foregoing business model, it is not possible for Uber to generate sustainable profits. The verity of Horan’s claim is visible from the last nine years of colossal losses that the company has made. Sherman goes further to state that to cut the overhead costs, one of the solutions would be to

¹¹³ “Uber Attracts Record Number of Drivers as Cost of Living Bites” (*BBC News* August 2, 2022) <<https://www.bbc.com/news/business-62396648>> accessed May 6, 2023.

¹¹⁴ “Uber Kenya Launch Party!” <<https://www.uber.com/en-ke/blog/uber-kenya-launch-party/>> accessed May 6, 2023.

¹¹⁵ *Kanuri Limited & 33 others v Uber Kenya Limited & 2 others* (Civil Case 356 of 2016) [2021] eKLR.

¹¹⁶ Horan H, “Uber’s Path of Destruction” (2019) 3 *American Affairs Journal*.

¹¹⁷ n9.

minimize driver earnings.¹¹⁸ According to former Operations Manager Alissa Orlando, that was the thought process at the top management leading to the 35% slash, and the reason for her resignation.¹¹⁹ The result of the slash is to increase the hardship between the low- and moderate-income families by extensively decreasing take-home pay.¹²⁰ The result is that such families face high income volatility and are at high risk of being trapped in debt. Numerous examples exist as a result of Uber's unreasonable growth strategy.¹²¹ Uber has short-changed its drivers in other jurisdictions as well. In 2017, Uber was exposed for improperly deducting over \$200 million in taxes from its drivers' earnings.¹²² (Kenya)

Daniels and Grinstein-Weiss note that the impact of the gig-economy platforms such as Uber has been to revolutionize the nature of work, giving people extensive control over their preferred working hours and obviating the traditional structures for supervision at the expense of traditional worker protections.¹²³ In addition to the foregoing examples of exploitation, Uber does not offer its drivers any further benefits other than their wages.

The reason is because Uber considers itself an online application that connects independent contractors with passengers, not an employer that hires drivers. As stipulated in its Terms of Service through carefully selected wording, Uber is a software company that hires independent contractors who work for a commission.¹²⁴ Through the contract, Uber maneuvers any liability to provide further benefits to its drivers other than wages on the basis of their classification.

¹¹⁸ Sherman L, "Uber's New Math: Increase Prices and Squeeze Driver Pay" (*Forbes* January 19, 2023) <<https://www.forbes.com/sites/lensherman/2023/01/16/ubers-new-math-increase-prices-and-squeeze-driver-pay/?sh=7b0c992cc8a2>> accessed May 6, 2023.

¹¹⁹ Njanja A, "Ex-Uber Executive Reveals How Driver Earnings Were Slashed in Kenya" (*TechCrunch* May 23, 2022) <<https://techcrunch.com/2022/05/23/ex-uber-executive-reveals-how-driver-earnings-were-slashed-in-kenya/>> accessed May 7, 2023.

¹²⁰ Daniels K and Grinstein-Weiss M, "The Impact of the Gig-Economy on Financial Hardship among Low-Income Families" [2018] SSRN Electronic Journal.

¹²¹ Sperber A and Sobecki N, "Uber Made Big Promises in Kenya. Drivers Say It's Ruined Their Lives." (*Pulitzer Center* December 1, 2020) <<https://pulitzercenter.org/stories/uber-made-big-promises-kenya-drivers-say-its-ruined-their-lives>> accessed May 7, 2023.

¹²² Scheiber N, "How Uber's Tax Calculation May Have Cost Drivers Hundreds of Millions" (*The New York Times* July 5, 2017) <<https://www.nytimes.com/2017/07/05/business/how-uber-may-have-improperly-taxed-its-drivers.html>> accessed May 7, 2023.

¹²³ n13.

¹²⁴ Burns S and Whelan M, "What's in the Uber Driver's Terms of Service?" (*Law Insider Resources*) <<https://www.lawinsider.com/resources/contract-teardown/whats-in-the-uber-drivers-terms-of-service>> accessed May 7, 2023.

As a result, the Uber driver, and the “gig” worker by extension, is a labourer who is as yet unable to enjoy the protections of the local labour regime and stands a marginalized, struggling and desperate worker contrary to their economic rights as enshrined in the text and spirit of the Constitution.

1.2. RESEARCH QUESTIONS THAT INFORM THIS ARTICLE

1. First, is Kenyan Labour Law sufficient to protect gig workers such as Uber drivers from exploitation?
2. Second, does Kenyan law guarantee Uber drivers any employment benefits?
3. Third, should the Kenyan labour law regime be revised to consider Uber drivers as employees and not independent contractors?

1.3. THIS ARTICLE TESTS THE FOLLOWING HYPOTHESES

1. First, Kenya labour law as it exists is not enough to protect Uber drivers from exploitation.
2. Second, Kenyan law only guarantees employment benefits to workers employed under contracts of service.
3. Third, The Kenyan labour law regime should be revised to reflect Uber drivers as employees and not independent contractors to avail them important employment benefits.

1.4. RESEARCH OBJECTIVES

The purpose of this research is to spread awareness of the poor working conditions of gig workers and to attempt to provide feasible solutions towards their relief. This paper will attempt to create an understanding of the deficiency of the Kenyan legal regime in protecting the rights of gig workers. Additionally, it will expound upon those rights and benefits owed to the gig worker that would allow them to live with dignity and ownership of their employment. This research will show how other jurisdictions have managed to provide those rights to their gig workers. By drawing on those examples, this research will justify the claim that the employment status of gig workers should be considered as contracts of service to avoid the dangers of leaving employment to contractual relations.

1.5. LITERATURE REVIEW ON THE GIG ECONOMY IN THE KENYAN CONTEXT

This literature review elaborates the concept and the nature of the gig economy in Kenya and globally. It defines what the gig economy is and the components or characteristics of the economy. Then we analyze the status of gig workers and the general prospects in their form of work. Lastly, this review analyzes the various solutions fielded within the literature on how to improve the prospects of gig workers.

The gig economy is defined as “the collection of markets that match providers to consumers on a gig (or job) basis in support of on-demand commerce.”¹²⁵ It is also known as the sharing, on-demand or platform economy, and often uses technology to connect consumers to resources they need in real-time.¹²⁶ Essentially, gig workers enter into contracts with companies such as Uber, Upwork, Lyft, Airbnb, thredUP, ZipCar that provide on-demand services to their clients and work for variable remuneration. A distinction is emphasized between “crowd work systems” and “work-on-demand systems.” Crowd work systems involve bidding, performing and delivering work online while “work-on-demand” systems involve real-world tasks that are availed and organized by online platforms run by companies that retain a significant degree of control over the gig workers.¹²⁷ Gig jobs also differ from traditional freelance jobs in a number of ways including reduced entry costs occasioned by the established lucrative store front and brand image created by the technology company, reduced operating costs and greater flexibility around work hours and scheduling.¹²⁸ Three main characteristics setting on-demand systems from other forms of freelance work.

- First, On-Demand companies collect a portion of job-earnings via a commission which is often a flat-rate of the earnings made by the worker.

¹²⁵ Sarah A. Donovan and others, ‘What Does the Gig Economy Mean for Workers?’ (Congressional Research Service, 2016).

¹²⁶ Pinsof J, “A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy” (2016) 22 Michigan Telecommunications and Technology Law Review 341

¹²⁷ Ibid.

¹²⁸ n18, 1.

- Second, On-Demand companies control the brand by screening their affiliates, requiring some job experience, licenses and retaining the right to terminate the working relationship.
- Third, On-Demand companies control the provider-client relationship by barring workers from accepting work outside the platform, meaning that the workers cannot create a client base.¹²⁹

The gig economy has become a lucrative form of work for several reasons. The main reason is the autonomy manifested in the flexibility in working hours and scheduling that is otherwise unavailable in mainstream work and pushes many professionals from conventional work.¹³⁰ Additionally, some gig workers are free to serve numerous clients at rates at which they fix for themselves with reduced or minimal supervision.¹³¹ Orly also espouses a view that gig work serves to “increase economic efficiency, reduce idleness, and spur both the entrepreneurial spirit and capital investment.”¹³²

It is widely accepted that gig work is an alternative form of work that is done in addition to the main form of employment simply to supplement existing income. In addition, a significant section of gig workers is still studying and merely looking for extra income. However, the gig economy is increasingly becoming the main source of sustenance for many workers.

According to a 2022 survey by McKinsey, 25.7% of gig workers take on atypical work for sustenance, a rise from 14% in a previous study, while 24.9% actively choose the work for the autonomy.¹³³ The survey by McKinsey & Company reveals that despite the utility of the gig economy in brightening financial prospects, it has been associated with several damning traits in relation to working conditions and employment benefits.

¹²⁹ n18, 2.

¹³⁰ Pichault F and McKeown T, “Autonomy at Work in The Gig Economy: Analysing Work Status, Work Content and Working Conditions of Independent Professionals” (2019) 34 *New Technology, Work and Employment* 59, 60.

¹³¹ n19, 346.

¹³² Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2017) 51 *USF L Rev* 51, 53

¹³³ Andre D and others, 'Freelance, side hustles, and gigs: Many more Americans have become independent workers' (McKinsey & Company, August 23, 2022) <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers> >Accessed 8 May, 2023.

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Gig workers are not considered employees, but rather independent contractors. As a result, they are exempt from many of the traditional benefits that employees are privy to. They must pay their own payroll taxes directly to the government, including income taxes and their share of social security. They also cater for expenses such as disability and health insurance and ensure their own job security and sustainable income.¹³⁴ By the very definition of the term independent contractor, they are carved out of most labour and employment statutes and sidelined from receiving benefits such as antidiscrimination, wage and hour, and family and medical leave protections, unemployment insurance and workers' compensation programs as well as the right to unionize.¹³⁵ Orly laments the irregularity and unpredictability of jobs within that sphere, the diminishing privacy due to the need for a strong online profile and the degeneration of friendly, trust-based interactions into monetized transactions.¹³⁶ Orly avers that the greatest transgression of the platform economy is that "By recasting all customer-facing interactions as peer-to-peer transactions, companies mask their interests while avoiding corporate responsibilities toward, and liabilities for, workers and consumers."¹³⁷

Thompson argues that the entirety of the problem rests in the loss of traditional safety net benefits.¹³⁸ While the spirit of labour law and that of article 41 of the Constitution of Kenya¹³⁹ requires the provision of fair working conditions, it is impossible for the same to be extended to gig workers as the fundamental tension between gig workers and labour laws arises in the legal distinction between an employee and an independent contractor.¹⁴⁰

A number of solutions has been offered as to how to remedy their position and improve their prospects. It has been suggested that there should be established a third employment category for workers who would qualify for benefits associated

¹³⁴ n19, 346.

¹³⁵ Ibid.

¹³⁶ n25, 54 - 55.

¹³⁷ n29, 55.

¹³⁸ Thompson BY, 'Digital Nomads: Outcasts of the Global Bazaar Economy' [2021] JOURNAL OF CULTURE, POLITICS AND INNOVATION 33.

¹³⁹ Constitution of Kenya 2010, art 41.

¹⁴⁰ Seth C. Oranburg, 'Unbundling Employment: Flexible Benefits for the Gig Economy' (2018) 11 Drexel L Rev 1.

with a more traditional employment relationship. These include insurance, tax withholding but not labour protections that are based on the number of hours worked such as minimum wage and overtime. Another proposed solution has been to allow on-demand workers to pay into a common fund that provides health, retirement, unemployment, and other benefits that are tied to the worker instead of the employer through new mechanisms, such as portable benefits or risk-pooling.¹⁴¹

In addition, the literature suggests that courts should incrementally expand the reach of the existing legal framework through the use or threat of test cases to show that gig workers are employees. This involves expanding definitions of employment to include gig workers, reconsidering the concept of an employer and the creation of rights for workers and not employees.¹⁴² The most common of the foregoing options has been to apply tests that classify gig workers as employees. Seth Oranburg argues that considering gig workers as employees is basically jamming circular pegs into square holes and only convenient to 1.1% of the gig worker population.¹⁴³

However, Veena Dubal notes that online platforms have attempted to frame the argument around survey findings to the same effect, but through extensive ethnographic engagement and participant observation, concludes that, the question of whether gig workers want to be employees is fundamentally the wrong one and the better inquiry is what kinds of protections do workers in the platform-based service economy need.¹⁴⁴

Dubal notes that gig workers need wage guarantees, workers' compensation upon workplace injury, unemployment insurance in the instance of summary dismissal,

¹⁴¹ n18, 15.

¹⁴² Stewart A and Stanford J, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28 *The Economic and Labour Relations Review* 420, 429-431.

¹⁴³ n33, 48.

¹⁴⁴ V. B. Dubal. 'An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation In The Gig Economy' (2019) Research Paper No. 381 https://www.researchgate.net/profile/Veena-Dubal/publication/337696234_An_Uber_Ambivalence_Employee_Status_Worker_Perspectives_Regulation_in_the_Gig_Economy/links/627ea73537329433d9adfc6e/An-Uber-Ambivalence-Employee-Status-Worker-Perspectives-Regulation-in-the-Gig-Economy.pdf accessed 8 May 2023.

freedom from discrimination at work, healthy and safe workplaces, and the rights to unionize and picket.¹⁴⁵

Seth argues that government should work with companies in the gig economy to provide a definition of the gig worker that assures protections necessary for an independent contractor.¹⁴⁶ Orly Lobel proposes that the test used to determine employment status be simplified, making some benefits independent of employment status, delinking welfare from work as in the Dutch context and the creation of the category of *dependent contractor* that allows unionization and notification of termination.¹⁴⁷

However, in full cognizance of the propensity of companies in the gig economy to classify as independent contractors those workers that serve in a capacity that can be reasonably considered employment, it is necessary to establish workers that can be considered as operating under contracts of service or otherwise. That distinction is drawn by use of various tests.

1.5.1. The Common Law Control Test of Employment on Kenyan Uber Drivers

The Common Law Control Test assesses the extent of control that one party in a relationship exerts over another. The first factor of this test is control and supervision.¹⁴⁸ Jennifer Pinsof asserts that Uber drivers are essentially employees as the result of Uber imposing standards of conduct, monitoring workers through rating systems, and maintaining the ability to fire employees at will.¹⁴⁹

The second factor is that of integration, where the objective observer gauges the centrality of the task being performed by the gig worker to the activities of the business.¹⁵⁰ If the overall business cannot be conceived without them, they can be considered employees. While Uber argues that it is a software, that semantic trick does not stand in a court of law. Pinsof shows that Uber does not earn money from

¹⁴⁵ n37, 21.

¹⁴⁶ n43, 53.

¹⁴⁷ n25.

¹⁴⁸ n23, 62.

¹⁴⁹ n19, 358.

¹⁵⁰ n23, 62.

selling software, but instead from taking commissions from drivers, making drivers employees.¹⁵¹

Another factor is skill level, where the less sophisticated the skill, the more likely the classification as an employee. Other factors that suggest an employment relationship under this test are long-term engagements, use of employer-provided tools, working onsite, payment at an hourly rate or as wages, employment by a single entity and type of business.¹⁵² The only factors that uber drivers do not satisfy are the use of employer-provided tools, location of work and payment per trip. Under this test, it is reasonable to consider Uber drivers as employees.

1.5.2. The Entrepreneurial Potential Test of Employment on Kenyan Uber Drivers

‘The entrepreneurial Potential Test’ a test widely used in the American context. Under this test, the more entrepreneurial opportunity that workers have for gains or losses the more likely they are to be considered independent contractors.¹⁵³ This test was developed in *FedEx Home Delivery v. NLRB*¹⁵⁴ in 2009 and used again in 2019 in *SuperShuttle*.¹⁵⁵

1.5.3. The ABC Test of Employment on Kenyan Uber Drivers

This test was developed in California and begins with the presumption that the worker is an employee. The burden of proof lies upon the company to show that it exerts no control over the worker, the work is outside the usual course of the employer’s business and the worker is customarily engaged in an independently established business.¹⁵⁶

¹⁵¹ n19, 360.

¹⁵² n19.

¹⁵³ n37, 7.

¹⁵⁴ *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

¹⁵⁵ *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*. Case 16–RC–010963, Jan. 25, 2019.

¹⁵⁶ Davidov G and Alon-Shenker P, ‘The ABC Test: A New Model for Employment Status Determination?’ (2022) 51 *Industrial Law Journal* 235.

1.5.4. Consistency or Complexity Test of Employment in Kenya

This test combines various factors and gauges whether, on a balance of probability, a contract of service exists. The factors assessed are control, ownership of tools, chance of profit and risk of loss and involves an analysis of the activities of the person actually doing the work.¹⁵⁷

1.6. CONCEPTUAL AND THEORETICAL FRAMEWORK UNDERLYING THE RESEARCH

1.6.1 Conceptual and Theoretical framework on the Paternalistic Approach to Labour Law

This study will rely on the paternalistic theory of labour law as the backdrop against which to contextualize the rights and duties of the gig worker. There is a pertinent need to protect employees from terms of engagement that may prejudice them. Gerald Dworkin suggests that the paternalistic function of labour law is inevitable given the inherent limitations placed upon human beings.¹⁵⁸ According to Dworkin, "...we would be most likely to consent to paternalism in those instances in which it preserves and enhances for individuals their ability to rationally consider and carry out their own decisions."¹⁵⁹ The human being is not an electric invention, and must be treated according to his/her limits. However, the paternalistic debate is often controversial on the basis that it infringes the right to self-determination.

According to Horacio Spector, some aspects of paternalism can be exercised without interference with the individual's liberty, such as maximum hours legislation.¹⁶⁰ To that effect, the law stipulates that the length of night work to not be longer than eight hours for every twenty-four (24) hours.¹⁶¹ It is to protect litigants from the imbalance of power in the employer-employee context that the courts find justification to link certain employment status with certain employment rights.

¹⁵⁷ n23, 62.

¹⁵⁸ Gerald Dworkin, 'Paternalism' (1972) 56 *Monist*.

¹⁵⁹ *Ibid*, 33.

¹⁶⁰ Spector H, "Philosophical Foundations of Labor Law" [2009] SSRN Electronic Journal.

¹⁶¹ The Working Time Regulations 1998, s6(1).

The following words of Smith LJ in *Protectacoat Firthglow Ltd v Szilagyi* are important

“... the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by.”¹⁶²

The upshot is that the written terms of a contract are the most important starting point to determine the intention of the parties. Yet they do not necessarily mirror the actual employment status and can be interpreted by the court based on the evidence adduced regarding the conduct of the parties. The courts do so in order to check the imbalance of power in the employer-employee relationship that must be mediated to ensure fairness. This research is guided by the paternalistic theory of labour law in advocating for the rights of the gig worker.

1.7. RESEARCH METHODOLOGY

This research uses a primarily library based doctrinal research methodology. The study thereby involves a comprehensive review of the extant primary and secondary sources of law. The primary sources used are legislation, case law and policy reports. The secondary sources engaged include books, to journal articles, to online materials from authoritative bodies such as Kenyan law.

2.0 IN-DEPTH ANALYSIS OF THE EMPLOYMENT RELATIONSHIP IN KENYA

This section explores how the legal and institutional framework in Kenya defines the employee-employer relationship and the benefits accrued thereof. A bottom-down approach is utilized, starting with the constitution, exploring the relevant statutes and finally analyzing the applicable case law.

¹⁶² [2009] EWCA Civ 98, para 51.

2.1. Legal Framework of Employment Relations in Kenya

2.1.1. The Constitution of Kenya, 2010 on the Employer-Employee Relationship

Article 41(1) of the Constitution guarantees fairness in employment, while 41(2) guarantees the right to fair pay and unionizing.¹⁶³ The text and the spirit of the Constitution protect the right of every worker to receive pay commensurate to their input and to join unions and participate in their activities.

2.1.2. The Labour Relations Act, 2007

According to section 2 of the Labour Relations Act (LRA), a contract of service is

“... any agreement, whether oral or in writing, expressed or implied, to employ or to serve as an employee in return for remuneration, and includes contract of apprenticeship and indentured learnership.”¹⁶⁴

An employee is defined as a person who works for wages or a salary. The rights conferred by the Act are only applicable in the event that a contract of service exists between the parties, but the Act explicitly acknowledges that an employment relationship can be implied depending on the circumstances.

2.1.3. The Employment Act, 2007 on the Employer-Employee Relationship

The definitions of an employer, employee and a contract of service mirror those in the Labour Relations Act (LRA). Under sections 26-34, the Act grants *inter alia* rights such as medical attention, housing, sick leave, maternity and paternity leave, annual leave and a designated number of working hours.¹⁶⁵ However, these rights are granted only to workers engaged in a contract of service.¹⁶⁶

¹⁶³ Constitution of Kenya, 2010.

¹⁶⁴ Labour Relations Act, 2007.

¹⁶⁵ The Employment Act, 2007.

¹⁶⁶ n58.

2.1.4. The Work Injury Benefits Act, 2008 on the Employer-Employee Relationship

The Work Injury Benefits Act (WIBA) offers a clearer definition of the term employee, and states that it applies

“...irrespective of whether the contract is expressed or implied, is oral or in writing, and whether the remuneration is calculated by time or by work done and whether by the day, week, month or any longer period and whether the payment is in cash or recognised legal tender.”¹⁶⁷

In order for gig workers to access rights such as medical insurance, workmen’s compensation and sick and annual leave, it is necessary to establish whether they are indeed workers or independent contractors. Various cases have laid down principles towards that end.

2.2. Case Law

Kenyan jurisprudence is very progressive on the matter of employment status and statutory interpretation. In the first instance, the court held in *Mugambi Imanyara & another v AG & 5 Others*¹⁶⁸ that the law should be interpreted to reflect the changing societal needs. Therefore, the court encourages the reflexivity of the law and its response to dynamic social institutions. It behooves the bench to dish out decisions that maximize justice and adapt the law to situations that require a different approach.

In *Adrian Kamotho Njenga v Kenya School of Law*, the court held that it is necessary to consider both the wording and the context of a statute in order to ascertain the true intent of the drafter.¹⁶⁹ Therefore, should the court choose to take a purposive approach to a statute, its rendition of the text must bear strict congruence to the wording of the law. It is in satisfying that condition that the courts came up with tests that can clarify the employment status of a worker.

¹⁶⁷ The Work Injury Benefits Act, 2008, s5(2).

¹⁶⁸ [2017] eKLR.

¹⁶⁹ [2017] eKLR.

In *Linus Simiyu Wamalwa v Bridge International Academies*, the court found a contract of service extant between the two parties.¹⁷⁰ In applying what was essentially the common law control test, it was proven that despite the daily Kshs. 500 wages, there was extensive control over the claimant. Control was exercised through extensive instruction and strict control, fixed working hours, the use of tools of trade provided by the respondent and the issuance of a staff card which showed that the claimant was regarded as a worker.

The court considers the opportunity to work for multiple entities as a fundamental indicator of an independent contractor. In *Charles Mutua Mwanzi v Invesco Assurance Company Ltd*, the court found that despite the respondent searching for and providing employment to the claimant, the claimant was not an employee as he performed similar duties for a multiplicity of other law firms, such as serving briefs.¹⁷¹ The court determined the applicable tests in regard to the employment relationship in *Christine Adot Lopeiyo v Wycliffee Mwachhi Pere*, including the control test which has been discussed elsewhere in this article.

In addition, the court specifies *the integration test*, which measures the extent to which the worker was subjected to the employer's rules as opposed to their own discretion and the centrality of their work to the business. The bench also identified the *test of economic or business reality* where the issue is whether the worker operated as an entrepreneur and worked on their own account, or for an employer who bore the risk of loss of profit. Lastly, the court identified the mutuality of obligation, where both parties made commitments to engage each other for a period of time, which promise is relied upon and promises security for both parties.

In conclusion, it can be inferred from the jurisprudence reviewed that Kenya has the requisite legal mechanisms to resolve the issue of employment status as complicated by the contract by Uber. Notably, the court lifted the corporate veil and established that Uber BV and Uber Kenya are the same entity and can be considered the same entity engaging with Kenyan drivers.¹⁷² Therefore, what remains is a public interest litigant to apply the decisions in foreign jurisdictions

¹⁷⁰ [2018] eKLR.

¹⁷¹ [2016] eKLR.

¹⁷² n8.

to the Kenyan context. The following part discusses foreign jurisprudence in regard to gig workers.

3.0 FOREIGN JURISPRUDENCE ON THE EMPLOYMENT RELATIONSHIP IN THE GIG ECONOMY

This section explores case law in foreign jurisdictions and how they interpreted the relationships between Uber and its drivers and how those interpretations influenced that relationship. This section explores the position of British, American and Canadian jurisprudence in that order regarding the status of Uber drivers.

3.1. The United Kingdom: Uber BV & Others v Aslam & Others

In the UK, the Supreme Court put to rest the issue of the employment status of Uber drivers. Lord Leggatt espoused the majority position and affirmed the decisions of the Employment Appeal Tribunal and the majority of the Court of Appeal that the drivers were employees of Uber. The main issue was “whether, for the purposes of the statutory definition, the claimants are to be regarded as working under contracts with Uber London or whether they are to be regarded as performing services solely for and under contracts made with passengers through the agency of Uber London.”¹⁷³

The role of the court was not deciding whether the drivers deserved employment benefits but whether they were employees under Working Time Regulations 1998, Minimum Wage Act 1998 and the Employment Rights Act 1996, through which they were entitled to the national minimum wage and other protections. Lord Leggatt was of the view that a contract may not enshrine the totality of the relationship between the parties and some inferences would have to be drawn from their conduct and the Judge justified the court’s purposive interpretation as meant to protect vulnerable workers from exploitation.¹⁷⁴

The UK Supreme Court considered the control test performed by the Employment Tribunal and emphasized five (5) findings by the employment tribunal in

¹⁷³ Uber BV & Others v Aslam & Others [2021] UKSC 5.

¹⁷⁴ n66, para 85.

understanding the distinction between an employee and an independent contractor.

- First, the remuneration paid to the drivers was determined by Uber as the fares determined on the app
- Second, the contractual terms of service were dictated by Uber
- Third, Uber constrains the driver's choice to accept or decline requests for rides by controlling the information on the passenger's destination and setting a ceiling on the driver's cancellation rates and a floor on the rates of acceptance.
- Fourth, Uber exercises control over the type of car and technology used by the drivers and passengers.
- Fifth, Uber restricts communication and interaction between the driver and the passenger to the particular ride.¹⁷⁵

In addition to the foregoing considerations, the Employment Tribunal considered eight further factors to reach its decision, but they will not be specific in the interest of brevity.¹⁷⁶ The finding of the court was based on the extensive control that Uber exercised over its drivers.

3.2 The United States of America: A.L.J. Case No.016-23858

In 2017, the New York State Department of Labor decided that Uber drivers were employees for the purposes of receiving unemployment benefits.¹⁷⁷ Administrative Law Judge Michelle Burrowes considered whether three drivers referred to as JK, JH and AS, that had previously worked for Uber and become unemployed through various circumstances, were indeed employees at the time of their engagement with Uber. In doing so, the learned judge considered the aspects of control, include monitoring performance via driver ratings provided by clients, ride acceptance and cancellation rates and imposing various requirements and ceilings on those ratings, such as a 90% ride acceptance rate and a minimum rating of 4.3 stars.¹⁷⁸ In addition, the leaned judge also considered that Uber re-

¹⁷⁵ n66, para. 94-100.

¹⁷⁶ *Uber B.V. and Others v Mr Y Aslam and Others*: UKEAT/0056/17/DA, para 70.

¹⁷⁷ A.L.J. Case No.016-23858, retrieved from <<https://s27147.pcdn.co/wp-content/uploads/NY-Appeals-Board-Uber.pdf>>.

¹⁷⁸ n70, 10.

designated fares at its own discretion, addressed complaints by clients and catered for various costs and fines imposed on drivers which it considered unilaterally. While the judge acknowledged the fact that drivers were allowed to work with Uber's competitors and sub-contract other drivers, the final conclusion was that during the period in which drivers were providing services via the app, Uber exercised sufficient control over various elements of their work to classify them as drivers.¹⁷⁹

3.2. Canada: Uber Portier Canada Inc v Saurabh Sharma and the Director of Employment Standards, 2426-21-ES

In Canada, an Uber Eats courier by the name Saurabh Sharma brought action against Uber Portier Canada Inc. claiming that his misclassification as an independent contractor by Uber had deprived him of his rightful protections under the Employment Standards Act,¹⁸⁰ which entitles an employee to holiday pay and vacation pay. An employment standards officer ruled in favour of the claimant and designated him as an employee.¹⁸¹ Various features attributable to an independent contractor are visible. These include the flexibility of working hours and the use of their own cars and bikes and catering for their own operating costs yet Uber exercises control over very important aspects of the business such as the online platform, vehicular standards, licensing requirements, criminal history tracking and minimum driver rating requirements.¹⁸² Recently, a class action suit against Uber was certified which claims that uber misclassifies over 350,000 drivers as independent contractors.¹⁸³ It will be interesting to watch how the suit progresses and the final decision of the court in view of the changing technological landscape.

Generally, the law in the aforementioned jurisdictions points to a paternalistic approach to labor law that emphasizes the protection of vulnerable workers that

¹⁷⁹ n70, 16.

¹⁸⁰ Employment Standards Act, 2000.

¹⁸¹ Uber Portier Canada Inc. v Saurabh Sharma and the Director of Employment Standards, 2022 CanLII 35898 (ON LRB), <<https://canlii.ca/t/jp1zm>>, retrieved on 2023-05-16.

¹⁸² Thornicroft KW, 'The Misclassification of Gig Economy Workers – the Case of Ride-Hailing Drivers: CanLII Connects' (*The Misclassification of Gig Economy Workers – The Case of Ride-Hailing Drivers | CanLII Connects*, 2022) accessed 16 May 2023.

¹⁸³ Heller v Uber Technologies Inc, 2021 ONSC 5518 (the "Certification Decision").

display high economic dependence on their employer. As displayed through the tests employed against Uber, its extent of control over the requirements and operations of the drivers constitutes an employment relationship as would be found in a contract of service. The misclassification of the drivers as independent contractors can be considered in light of Lord Leggatt's commentary on the impropriety of leaving employment relations to contractual provisions.¹⁸⁴ In a modern age where technology increasingly blurs traditional distinctions between employees and independent contractors, it is necessary to inject clarity into the matter that would serve to avail the employees (if so found) of their rightful employment benefits and clarity in taxation.

4.0 FINDINGS, CONCLUSION AND RECOMMENDATIONS

This section outlines the findings of this article in regard to the employment status of Uber drivers using data from various jurisdictions. It then concludes the employment status of Uber drivers in the Kenyan context and provides recommendations tailored towards protecting gig workers in the Kenyan context.

4.1. Conclusion on the Employment Status of Kenyan Uber Drivers

This article has endeavoured to arrive at an understanding of the employment status of gig workers in Kenya and elsewhere using Uber drivers as a proxy. Jurisprudence around the world is increasingly taking a paternalistic route to the application of labour law. One recent development in the world of labour has been the rise of the gig economy since the late 2010s onwards. Gig workers are mostly considered as operating under contracts for service. However, gig workers are increasingly becoming dependent on the gig economy for sustenance and investing more of their time in their service. Their input is often not reciprocated in their respective industries because of their status as independent contractors, who cannot be afforded employment benefits such as annual leave, holiday pay and unemployment benefits in other jurisdictions. This research identified the trade-off inherent in the performance of gig work and traditional employment benefits. This research set out to appreciate the relationship between on-demand companies and their associates to contextualize the crisis among gig workers

¹⁸⁴ n67.

using Uber and its drivers as proxies due to the extensive development of case law involving them.

After analyzing that relationship, it was clear that Uber drivers are not eligible to receive such employment benefits as they are not considered employees, but rather as independent contractors. It was made salient that while Kenyan law provides sufficient protections for employees, they could not be extended to their category of workers. An analysis of the relevant provisions of what constitutes an employee was conducted.

However, an analysis of the case law showed that courts considered that relationship not confined to the definition within the contract.¹⁸⁵ It sometimes became necessary to analyze the relationship in order to infer the truth. The analysis showed various tests employed by the courts to clarify that relationship. The focus was on the following factors; first, the extent of control over the worker as opposed to their own discretion. Second the centrality of the gig work to the business. Third the provider of the equipment and tools of trade used. Fourth the ability to work for multiple entities and the mutuality of obligation over a period of time.

This research then identified similar tests and undertook a comparative analysis of how such tests had been employed in other jurisdictions. Recent decisions within and outside the Commonwealth point towards the proclivity to afford significant employment benefits to atypical workers that depend exclusively or mostly on various online platforms for their economic needs.

4.2. Recommendations for Legal Reform and Future Research

Under a paternalistic approach to labour law, it is the role of a legal system to promote the rights of vulnerable workers. As can be inferred from the comparative analysis, it is necessary to undertake the following six changes to adapt the current legal system to the reality of gig work. To that effect, this research makes several recommendations. First, a separate definition of what constitutes an independent contractor and an atypical worker should be included in the extant legal provisions

¹⁸⁵ n63.

analyzed in this study.¹⁸⁶ Second, the Act should clearly designate those rights that atypical workers are entitled to.¹⁸⁷

Third, in creating the aforementioned distinctions, the law would more accurately resolve the issue of employment status while simultaneously providing the most relevant and important worker benefits to give effect to article 41 of the constitution. Fourth, it is necessary to provide amend the current legal regime to reflect the prevailing social conditions and the emergence of the gig economy. Fifth, it is also necessary to increase research on what protections gig workers need so as to create laws that reflect what gig workers need without stifling the innovation by making it unprofitable. Sixth, linking what gig workers need and designating such rights in legislation would enable a balance between competing paternalistic inclinations of the law and corporate interests.

5.0 BIBLIOGRAPHY

Primary Sources

Case Law

A.L.J. Case No.016-23858, retrieved from < <https://s27147.pcdn.co/wp-content/uploads/NY-Appeals-Board-Uber.pdf>>

Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR

Charles Mutua Mwanzi v Invesco Assurance Company Limited [2016] eKLR

Christine Adot Lopeiyo v Wycliffee Mwathi Pere [2013] eKLR

FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009).

Heller v Uber Technologies Inc, 2021 ONSC 5518 (the “Certification Decision”)

Kanuri Limited & 33 others v Uber Kenya Limited & 2 others (Civil Case 356 of 2016) [2021] eKLR

Linus Simiyu Wamalwa v Bridge International Academies [2018] eKLR

¹⁸⁶ Wambaa IW, ‘An Analysis Of Uber Drivers’ Employment Status In Accordance With The Kenyan Labour Law’ (Thesis, 2018), 42.

¹⁸⁷ n18.

Mugambi Imanyara & another v AG & 5 others [2017] eKLR

Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA Civ 98

SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338. Case 16–RC–010963, Jan. 25, 2019.

Uber B.V. and Others v Mr Y Aslam and Others: UKEAT/0056/17/DA, para 70

Uber BV & Others v Aslam & Others [2021] UKSC 5

Uber Portier Canada Inc. v Saurabh Sharma and the Director of Employment Standards, 2022 CanLII 35898 (ON LRB), <<https://canlii.ca/t/jp1zm>>, retrieved on 2023-05-16

Statutes

Constitution of Kenya, 2010

Employment Standards Act, 2000

Labour Relations Act, 2007

The Employment Act, 2007

The Work Injury Benefits Act, 2008

The Working Time Regulations 1998

Secondary Sources

“Uber Attracts Record Number of Drivers as Cost of Living Bites” (*BBC News* August 2, 2022) <<https://www.bbc.com/news/business-62396648>> accessed May 6, 2023

“Uber Kenya Launch Party!” <<https://www.uber.com/en-ke/blog/uber-kenya-launch-party/>> accessed May 6, 2023

Andre D and others, ‘Freelance, side hustles, and gigs: Many more Americans have become independent workers’ (McKinsey & Company, August 23, 2022) <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers> Accessed 8 May, 2023

Digitizing Employment and Employment Status in the Era of Gig Work: The Case of Uber and Uber Drivers (Morgan Mwenda)

Burns S and Whelan M, “What's in the Uber Driver's Terms of Service?” (*Law Insider Resources*) <<https://www.lawinsider.com/resources/contract-teardown/whats-in-the-uber-drivers-terms-of-service>> accessed May 7, 2023

Cramer J and Krueger A, “Disruptive Change in the Taxi Business: The Case of Uber” (2016) 1065 177

Daniels K and Grinstein-Weiss M, “The Impact of the Gig-Economy on Financial Hardship among Low-Income Families” [2018] SSRN Electronic Journal

Davidov G and Alon-Shenker P, ‘The ABC Test: A New Model for Employment Status Determination?’ (2022) 51 *Industrial Law Journal* 235

Gerald Dworkin, 'Paternalism' (1972) 56 *Monist*.

Horan H, “Uber’s Path of Destruction” (2019) 3 *American Affairs Journal*

Njanja A, “Ex-Uber Executive Reveals How Driver Earnings Were Slashed in Kenya” (*TechCrunch* May 23, 2022) <<https://techcrunch.com/2022/05/23/ex-uber-executive-reveals-how-driver-earnings-were-slashed-in-kenya/>> accessed May 7, 2023

Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' (2017) 51 *USF L Rev* 51, 53

Pichault F and McKeown T, “Autonomy at Work in The Gig Economy: Analysing Work Status, Work Content and Working Conditions of Independent Professionals” (2019) 34 *New Technology, Work and Employment* 59, 60

Pinsof J, “A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy” (2016) 22 *Michigan Telecommunications and Technology Law Review* 341

Sarah A. Donovan and others, ‘What Does the Gig Economy Mean for Workers?’ (Congressional Research Service, 2016)

Scheiber N, “How Uber's Tax Calculation May Have Cost Drivers Hundreds of Millions” (*The New York Times* July 5, 2017) <<https://www.nytimes.com/2017/07/05/business/how-uber-may-have-improperly-taxed-its-drivers.html>> accessed May 7, 2023

Seth C. Oranburg, 'Unbundling Employment: Flexible Benefits for the Gig Economy' (2018) 11 *Drexel L Rev* 1

Sherman L, “Uber's New Math: Increase Prices and Squeeze Driver Pay” (*Forbes* January 19, 2023)

<<https://www.forbes.com/sites/lensherman/2023/01/16/ubers-new-math-increase-prices-and-squeeze-driver-pay/?sh=7b0c992cc8a2>> accessed May 6, 2023

Slavulj M, Kanižaj K and Đurđević S, “The Evolution of Urban Transport – Uber” in Stjepan Lakušić (ed), *Road and Rail Infrastructure IV* (University of Zagreb 2016)

Spector H, “Philosophical Foundations of Labor Law” [2009] SSRN Electronic Journal

Sperber A and Sobocki N, “Uber Made Big Promises in Kenya. Drivers Say It's Ruined Their Lives.” (*Pulitzer Center* December 1, 2020)

<<https://pulitzercenter.org/stories/uber-made-big-promises-kenya-drivers-say-its-ruined-their-lives>> accessed May 7, 2023

Stewart A and Stanford J, ‘Regulating Work in the Gig Economy: What Are the Options?’ (2017) 28 *The Economic and Labour Relations Review* 420, 429-431

Thompson BY, ‘Digital Nomads: Outcasts of the Global Bazaar Economy’ [2021] *JOURNAL OF CULTURE, POLITICS AND INNOVATION* 33

Thornicroft KW, ‘The Misclassification of Gig Economy Workers – the Case of Ride-Hailing Drivers: CanLII Connects’ (*The Misclassification of Gig Economy Workers – The Case of Ride-Hailing Drivers | CanLII Connects*, 2022) accessed 16 May 2023

Uber Technologies Inc. ‘Form 10-K’. (2023). <https://s23.q4cdn.com/407969754/files/doc_financials/2023/ar/2022-annual-report.pdf> accessed 6 May 2023.

Uber Technologies Inc. ‘Uber Announces Results for First Quarter 2023’ <https://s23.q4cdn.com/407969754/files/doc_financials/2023/q1/Uber-Q1-23-Earnings-Press-Release.pdf> accessed 6 May 2023

V. B. Dubal. ‘An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation In The Gig Economy’ (2019) Research Paper No. 381 https://www.researchgate.net/profile/Veena-Dubal/publication/337696234_An_Uber_Ambivalence_Employee_Status_Worker_Perspectives_Regulation_in_the_Gig_Economy/links/627ea73537329433d9a

Digitizing Employment and Employment Status in the Era of Gig Work: The Case of Uber and Uber Drivers (Morgan Mwenda)

[dfc6e/An-Uber-Ambivalence-Employee-Status-Worker-Perspectives-Regulation-in-the-Gig-Economy.pdf](#) accessed 8 May 2023

Wambaa IW, 'An Analysis of Uber Drivers' Employment Status In Accordance With The Kenyan Labour Law' (Thesis, 2018), 42